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No. 63919-6-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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**FILED**  
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CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

MARY FRANKLIN,

Respondent,

v.

JACKIE JOHNSTON

Petitioner.

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PETITION FOR REVIEW BY  
THE WASHINGTON SUPREME COURT

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## I. INTRODUCTION

Review in this case should be accepted. This case involves an unresolved issue of whether a natural parent whose child has been declared dependent and removed by the state can be forced to share her constitutionally protected parenting rights with the person who cared for the child during the dependency proceedings. All published authority from around this nation, including the published authority in this state, clearly does not allow involuntary shared parentage in these situations. Accepting review will allow this Court the opportunity to analyze and discuss the constitutional implications in these situations as well as the interplay between our state's intricate dependency statutes and common law *de facto* parentage.

Division One's published opinion in this case (the "Opinion") carelessly trampled over all biological parents' fundamental constitutional liberty interests in making child rearing decisions. It is well settled in this State that any state interference with a natural parent's fundamental right to make child-rearing decisions is subject to strict scrutiny and must be narrowly tailored to meet a compelling state interest. In order for this State's common law *de facto* parent analysis articulated in *In re Parentage of L.B.*<sup>1</sup> to pass constitutional muster, this Court expressly held a natural parent must *actively* and *affirmatively* foster and consent to the parent-child relationship between the child and the *de facto* parent because then the State is not interfering with the natural parents' constitutionally protected child rearing decision; rather, it is enforcing it. Here,

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<sup>1</sup> 155 Wn.2d 679, 122 P.3d 161 (2005)

the Opinion receded from *L.B.* and all other *de facto* parentage cases involving a child in dependency and concluded a natural parent's passive acquiescence to the state's placement in a dependency proceeding can satisfy the actively and affirmatively "consent and foster" requirement in *L.B.* This is unconstitutional.

The Opinion also vastly widened the narrow statutory gap in *L.B.* In *L.B.* this Court found the existing statutes did not contemplate parentage between a same-sex couple mutually intending to conceive a child together through artificial insemination, that brought that child into this world and did everything within their biological capabilities to accomplish this result, and raise their child in their non-traditional family. After finding that the existing statutes did not provide a clear path for this couple to establish parentage in this limited circumstance, *L.B.* supplied a common law remedy. Here, Division One widened this gap to now include a severed intimate relationship with a former lesbian lover who played no part in the conception or the conception decision, was not an intended parent, and who assisted the biological parent for only one month after the child was born before the state stepped in and found the child dependent and made all the placement decisions. The gap in this state's statutes is not that wide, especially when it involves dependency, because our state's dependency statutes provide pathways to establish parentage and custody in these cases.

By increasing this gap, the Opinion created a morass for the state and its agency that administers thousands of dependency cases each year. By counting the time a licensed or unlicensed foster parent provides care for a child that has been declared dependent toward the time it takes to establish *de facto*

parentage, the Opinion raised more questions than it answered. For instance, when does the licensed or unlicensed foster parent magically become a foster parent? When does the state have to get consent from the former foster and now *de facto* parent to adoption if the natural parent's parental rights are terminated or the natural parent consents to adoption? When does the foster parent have a right to a recognized substantive due process liberty interest in dependency proceedings entitling notice and an opportunity to be heard? Finally, when a foster parent becomes a *de facto* parent, does the dependency proceeding have to be dismissed because the child now has a fit parent? Even if the Opinion is ultimately affirmed, these questions need to be addressed.

The Opinion also obliterated this Court's requirements that were designed to prevent foster parents from being adjudicated *de facto* parents. First, *L.B.* held that any *de facto* parent must undertake parental duties "without an expectation of compensation." In doing so, this Court consciously chose to adopt the Wisconsin standard for this rigid requirement and rejected the more liberal choice articulated in Massachusetts, other jurisdictions, and the American Legal Institute ("ALI") that provided a *de facto* parent's caretaking motives cannot be primarily for compensation. Despite this, Division One, without analysis, waved its hands through this requirement and deemed it satisfied by citing examples from the more liberal ALI standard to support the way it applied our more rigid standard.

Finally, the Opinion ignored *L.B.*'s explicit pronouncement that *de facto* parentage is reserved for only those persons who occupy a permanent and unequivocal role in the child's life. The United States Supreme Court has held

a foster parent's expectations regarding a dependent child are totally controlled by the state statutes and contractual arrangements the state has with the foster parent. Moreover, *L.B.* painstakingly pointed out that in our state, foster parents cannot occupy the permanent and unequivocal role in a child's life because they are, by definition, a temporary caretaker for the child until the parent becomes fit and the child can be reunified with his or her parent.

For all these reasons, review should be accepted and the trial court's decision and Division One's Opinion should be reversed and remanded with instructions to enter an order dismissing Mary Franklin's parentage petition.

## **II. PETITIONER'S IDENTITY**

Petitioner is the Respondent/Cross-Appellant at the Court of Appeals and the Respondent at the trial.

## **III. CITATION TO APPELLATE DECISION TO BE REVIEWED**

Petitioner requests the Washington Supreme Court review the Washington State Court of Appeals published Opinion in *In re Custody of A.F.J.*, Cause No. 63919-6-I, which was consolidated with 63982-0-I, 251 P.3d 276, Washington Court of Appeals, Division One (May 16, 2011), herein the "Opinion."

## **IV. ISSUES PRESENTED FOR REVIEW**

### **A. Significant Question of Law under the U.S. Constitution.**

**1. Consenting to and Fostering a Parent-Like Relationship.** The Opinion involves a significant question under the United States Constitution because a natural parent must actively and affirmatively consent to and foster a parent-like relationship between her or his child and a third party before a court can abridge that parent's fundamental right to make decisions as to the care,

custody, and control of her child. Here, the Opinion holds a natural parent's passive acquiescence to the state placing the child with the natural parent's former lesbian lover continues to foster and encourage a parent-child relationship even though the natural parent's ability to make child rearing decision is suspended once their child is adjudicated dependent.

**B. Conflicts with Decisions of this Court.**

**1. Expectation of Financial Compensation.** The Opinion in this case conflicts with this court's decision in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005) that holds that a *de facto* parent must have assumed obligations of parenthood without expectation of financial compensation.

**2. Statutory Gap.** The Opinion in this case conflicts with this court's decisions in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005) and *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010), which are clear that the common law doctrine of *de facto* parentage is a remedy available only to address gaps in existing statutory enactments.

**3. Permanent and Unequivocal Parental Role.** The Opinion in this case conflicts with this court's decisions in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005) and *In re Dependency of J.H.*, 117 Wn.2d 460, 815 P.2d 1380 (1991), which affirmed that because foster placement is temporary, transitional, and for the purpose of supporting reunification with the legal parents, the law does not establish a right on the part of a foster parent to continue the relationship.

**4. Time Sufficient to Establish Bonded, Dependent Relationship.** The Opinion conflicts with this court's decision in *In re Parentage of L.B.*, 155



Wn.2d 679, 122 P.3d 161 (2005), which holds that a *de facto* parent must have been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

### **C. Substantial Public Interest.**

**1. Foster Parents as De Facto Parents.** This matter substantially affects public interests because inclusion of foster parents as persons who can be granted *de facto* parent status undermines the integrity of a state-run system designed to provide temporary, not indefinite, care for children.

## **V. CASE STATEMENT**

Petitioner, Ms. Johnston, had a “cross-state” dating relationship with Mary Franklin. Johnston maintained a home in California and Franklin maintained a home in Seattle.<sup>2</sup> Their relationship was turbulent.<sup>3</sup> It was also sporadic.<sup>4</sup> Franklin stated on more than one occasion she would not be in a relationship with Ms. Johnston if Ms. Johnston continued to use drugs. Despite this, Ms. Johnston kept using drugs and the relationship was plagued by continuous break ups and reconciliations.<sup>5</sup>

In early 2005, Johnston and Franklin were estranged; according to Franklin, Ms. Johnston was in California and in “dire straits” and called Franklin for help.<sup>6</sup> Franklin flew to California on January 20, 2005.<sup>7</sup>

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<sup>2</sup> VRP (Franklin 3/26/09) 10:9-24; 11:7-8.

<sup>3</sup> FOF 2.12(J), ln 17-18, CP 709.

<sup>4</sup> VRP (Kent Fremont-Smith 3/31/09) 19:15-24; and VRP (Johnston 3/30/09) 82:2-6.

<sup>5</sup> VRP (Franklin 3/26/09) 8:23-9:8; and VRP (Johnston 4/8/2009) 31:13-17.

<sup>6</sup> VRP (Franklin 3/26/09) 18:22-19:16.

<sup>7</sup> VRP (Franklin 3/26/09) 18:22-19:4

Franklin soon returned to Washington, but Johnston remained in California, relapsed again, and the parties broke off their relationship; Ms. Johnston got pregnant.<sup>8</sup> The pregnancy was not intended by either woman.<sup>9</sup> Johnston and Franklin learned of the pregnancy in March 2005.<sup>10</sup> Ms. Johnston then tried to get back together with Franklin.<sup>11</sup> Ms. Johnston returned to Washington, but the relationship remained “tenuous.”<sup>12</sup>

In Seattle, Johnston had two residential treatment stays at Swedish: first for 21-days and then for 40-days.<sup>13</sup> After the 40-day treatment, Franklin let Johnston, sober for just 6 weeks, stay at her house while Franklin went to Thailand. At Franklin’s home, Johnston relapsed again.<sup>14</sup>

Because of the relapse, Johnston left Franklin’s home and the women had no more contact until after A.F.J. was born.<sup>15</sup> Franklin admits the relationship was fractured.<sup>16</sup> Johnston believed they had broken up.<sup>17</sup>

A.F.J. was born November 20, 2005.<sup>18</sup> Ms. Johnston was in treatment at PTS.<sup>19</sup> Franklin was not present at the birth.<sup>20</sup> She was done with Ms. Johnston.<sup>21</sup> Franklin had 2 overnight visits with the child while Ms.

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<sup>8</sup> VRP (Franklin 3/26/09) 22:2-9 and 23:1-3; VRP (Johnston 4/8/2009) 16:21-17:5.

<sup>9</sup> FOF No. 2.12(J); and VRP (Franklin 3/26/09) 8:19-22.

<sup>10</sup> VRP (Franklin 3/26/09) 23:21-24.

<sup>11</sup> FOF 2.12(J). In 16-17, CP 709.

<sup>12</sup> VRP (Franklin 3/26/09) 42:8-10.

<sup>13</sup> VRP (Franklin 3/26/09) 31:9-17.

<sup>14</sup> VRP (Franklin 3/26/09) 31:1-25.

<sup>15</sup> VRP (Franklin 3/26/09) 33:22-24:2; and VRP (Johnston 4/8/2009) 22:2-9.

<sup>16</sup> VRP (Franklin 3/26/09) 41:13-14.

<sup>17</sup> VRP (Johnston 3/30/2009) 63:13-21.

<sup>18</sup> FOF 2.12(A), CP 707.

<sup>19</sup> FOF 2.12(K), In 23, CP 709; and VRP (Franklin 3/26/09) 16:1-2.

<sup>20</sup> VRP (Johnston 3/30/2009) 64:20-24.

<sup>21</sup> VRP (Johnston 4/8/2009) 22:15-21.

Johnston was in PTS.<sup>22</sup> Johnston left PTS on December 24, 2005.<sup>23</sup> Ms. Johnston had clean and sober housing in Tacoma, where she lived half the time and visited with Franklin half the time for about a month, until DSHS removed the child from Ms Johnston's care.<sup>24</sup>

Johnston relapsed again in late January 2006 while A.F.J. was in her care and while she and A.F.J. were staying with Franklin. DSHS removed the child a few days later.<sup>25</sup> The State filed a dependency proceeding on January 26, 2006.<sup>26</sup> A.F.J. had not been in Ms. Johnston's physical custody since January 26, 2006,<sup>27</sup> which was less than 2 months between the child's birth and intervention by DSHS.<sup>28</sup>

At the 72-hour shelter care hearing in the dependency, at the end of January 2006, Franklin was told the only way she could have A.F.J.'s temporary custody during the dependency proceedings was to become a foster parent.<sup>29</sup> Franklin agreed and took foster parent training.<sup>30</sup> In April 2006 Franklin knew she would be paid for her foster care services.<sup>31</sup>

Franklin understood the State had custody over A.F.J. once it took him from Ms. Johnston.<sup>32</sup> The trial court found Franklin had status as a foster

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<sup>22</sup> FOF 2.12(K), *ln 23*; VRP (Johnston 3/30/2009) 53:17-20.

<sup>23</sup> VRP (Johnston 4/8/2009) 24:3-5.

<sup>24</sup> VRP (Franklin 3/26/09) 16:4-16; and VRP (Johnston 4/8/2009) 24:17-25:4.

<sup>25</sup> VRP (Franklin 3/26/09) 34:10-25.

<sup>26</sup> VRP (Johnston 3/30/2009) 56:10-12.

<sup>27</sup> FOF No. 2.7, CP 706.

<sup>28</sup> FOF No. 2.12(L), *ln 4*.

<sup>29</sup> VRP (Franklin 3/26/09) 36:20-23.

<sup>30</sup> VRP (Franklin 3/26/09) 36: 24-25.

<sup>31</sup> VRP (Franklin 3/26/09) 37:5-16; and 39:22-40:1.

<sup>32</sup> VRP (Franklin 3/26/09) 46:2-7.

parent and DSHS had the right, at any time, to remove the child from her home with little or no notice.<sup>33</sup>

In February 2006, Franklin made clear to Ms. Johnston that she had enough and whatever their relationship may have been in the past, they were just going to be friends in future.<sup>34</sup> They never reconciled after that.

In June 2006, Ms. Johnston entered Seadrunar residential treatment center.<sup>35</sup> Johnston and Franklin were clearly not together at that time.<sup>36</sup> Johnston left Seadrunar about 3 months later and lived in various places including briefly with Franklin before a final relapse on Nov. 9, 2006.<sup>37</sup>

When Johnston relapsed she was arrested and spent 6 weeks in jail without contact with Franklin.<sup>38</sup> Then, she spent one month at Genesis House and still had no contact with Franklin.<sup>39</sup> Johnston then went back to Seadrunar in February 2007 and remained for 9 months.<sup>40</sup> During this time, Johnston and Franklin had not reconciled and were not a couple.<sup>41</sup>

Franklin, by now a paid foster parent, did bring A.F.J. to Seadrunar so Johnston could see him.<sup>42</sup> Franklin testified that when she filed her petitions for third party custody and to be adjudicated a *de facto* parent in

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<sup>33</sup> FOF 2.12(O), CP 710.

<sup>34</sup> VRP (Franklin 3/26/09) 44:6-10; 48:19-23; VRP (Johnston 3/30/2009) 65:3-9; and VRP (Kent Fremont-Smith 3/31/09) 26:1-28:3.

<sup>35</sup> VRP (Johnston 4/8/2009) 27:4-7.

<sup>36</sup> VRP (Johnston 4/8/2009) 27:22-24.

<sup>37</sup> VRP (Johnston 4/8/2009) 27: 15-16 and 28:6-20.

<sup>38</sup> VRP (Johnston 4/8/2009) 29:12-23.

<sup>39</sup> VRP (Johnston 4/8/2009) 29:24-30:3 and 30:24-31:3.

<sup>40</sup> VRP (Johnston 4/8/2009) 30:16:21.

<sup>41</sup> VRP (Johnston 4/8/2009) 31:6-9.

<sup>42</sup> VRP (Johnston 4/8/2009) 33:8-10.

May 2007 she understood the romantic relationship was over.<sup>43</sup> Franklin's last visit to Seadrunar, also the last time she and Johnston had substantive communication, was August 2007.<sup>44</sup>

Johnston was discharged from Seadrunar November 2007. She lived with her sister for four days, then found clean and sober housing near her sister's home.<sup>45</sup> She lived there for over a year until December 6, 2008 when she and A.F.J. moved in with her mom and her mom's life companion, Col. (Ret.) D. Baker.<sup>46</sup>

Franklin appealed the results from her third party custody petition and parentage petition filed on November 7, 2007.<sup>47</sup> Franklin neither named the child's father in either petition nor gave father any notice of these proceedings.<sup>48</sup> Adequate cause on Franklin's non-parent custody petition was established on January 11, 2008.<sup>49</sup>

After a long trial, the trial judge found Johnston was a fit parent and A.F.J.'s placement with Ms. Johnston would not result in actual detriment and dismissed Franklin's third party custody petition.<sup>50</sup> The trial judge also concluded Franklin, A.F.J.'s foster parent, was A.F.J.'s *de facto* parent despite Franklin having been paid by the State for foster care

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<sup>43</sup> VRP (Franklin 3/26/09) 39:19-20 and 48:19-23.

<sup>44</sup> VRP (Johnston 3/30/2009) 76:24-77:6; 80:5-15.

<sup>45</sup> VRP (Johnston 4/9/2009) 4:10-19.

<sup>46</sup> VRP (Johnston 4/9/2009) 5:7-20.

<sup>47</sup> *See* Petitions filed in cause numbers 07-3-07493-1 UFK and 07-5-02508-2 UFK, referenced in Respondent's Supplemental Designation of Clerk's Papers filed August 2, 2010.

<sup>48</sup> *Id.* and CP 1-14.

<sup>49</sup> CP 19-21.

<sup>50</sup> CP 707-709 and 701-703.

services for most of A.F.J.'s life.<sup>51</sup> The trial court entered a parenting plan awarding Franklin and Johnston substantially equal time with A.F.J.<sup>52</sup>

On July 25, 2009 Franklin filed a Notice of Appeal seeking to appeal the judgment that established parentage and awarded attorney fees and costs, the findings of fact and conclusions of law, the child support order, the parenting plan, and an order denying her reconsideration.<sup>53</sup> Johnston did not initially appeal, but after learning of Franklin's appeal, Johnston filed a notice of cross appeal on August 5, 2009 appealing the same judgment and orders that Franklin appealed and also the trial court's July 15, 2009 order that implemented the residential schedule.<sup>54</sup>

The Appellate Court affirmed the trial court's *de facto* parentage determination,<sup>55</sup> the award of child support to Johnston,<sup>56</sup> the parenting plan,<sup>57</sup> and the award of attorney fees to Johnston.<sup>58</sup>

## **VI. ARGUMENT**

### **A. Significant Question of Law under the U.S. Constitution.**

The law presumes that biological parents are not only fit, but will act in the best interest of their children.<sup>59</sup> The "liberty" protected by the Due Process

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<sup>51</sup> CP 709 - 711; and 701-703 and VRP (Franklin's 3/26/09 Testimony) 36:20 – 38:19 and 39:19 – 40:1.

<sup>52</sup> FOF 2.12(T), CP 711; and CP 769-777.

<sup>53</sup> *See*, Franklin's Notice of Appeal designated in Supplemental Clerk's Designation filed August 16, 2010.

<sup>54</sup> CP 742-743.

<sup>55</sup> Opinion at 22.

<sup>56</sup> Opinion at 24.

<sup>57</sup> Opinion at 25.

<sup>58</sup> Opinion at 27.

<sup>59</sup> *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

Clause of the Fourteenth Amendment includes the right of parents to “establish a home and bring up children.”<sup>60</sup> The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest fundamental liberty interest recognized by the U.S. Supreme Court.<sup>61</sup>

In *In re Custody of Smith*, this Court applied a strict scrutiny analysis in determining whether a grandparent's use of the visitation statute infringed on the biological parent's “fundamental ‘liberty’ interest.”<sup>62</sup> In doing so, this Court stated that “state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.”<sup>63</sup>

The *L.B.* court embraced the position that the first of the four *de facto* parent standards, that the “natural or legal parent consented to and fostered the parent-like relationship,” incorporates the constitutionally requisite deference to the legal parent.<sup>64</sup> A showing of having “consented to and fostered” the parent-like relationship is therefore a threshold requirement that is critical to the constitutional analysis.<sup>65</sup> *L.B.* is clear that this requirement can be met only through the active encouragement of the biological (or adoptive) parent by affirmatively establishing a family unit with the *de facto* parent and child that accompanies the family.<sup>66</sup> The requisite “active encouragement” is in contrast

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<sup>60</sup> *Id.* at 65, quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

<sup>61</sup> *Troxel*, 530 U.S. at 65.

<sup>62</sup> 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd on other grounds sub nom.*

<sup>63</sup> *Id.*

<sup>64</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 709, 122 P.3d 161 (2005).

<sup>65</sup> *Id.* at 712.

<sup>66</sup> *Id.* at 712 (emphasis added).

to “mere passive acquiescence,” which does not satisfy the threshold requirement for establishing *de facto* parent status.<sup>67</sup> Furthermore, the requirement of affirmatively establishing a family unit, with another adult and the child, necessitates that the child first be born. Participation in pre-natal care fosters no parent-like relationships.

Here, A.F.J. was born on November 20, 2005, and the State filed a dependency action on January 26, 2006. A.F.J. was nine weeks old. Beginning at that time, the dependency controlled the relationship, A.F.J. was in custody of the state, and the most Johnston could do was passively acquiesce to his placement with Franklin. The constitutionally required deference to the legal parent could not be met under these circumstances.

## **B. Conflicts with Decisions of Supreme Court.**

### **1. Assumed Obligations without Expectation of Compensation.**

In *L.B.*, this Court expressly adopted the “criteria [to establish standing as a *de facto* parent] delineated by the Wisconsin Supreme Court and set forth in the Court of Appeals opinion below [i.e., set forth in *In re Parentage of L.B.*, 121 Wn. App. 460, 89 P.3d 271 (2004)].”<sup>68</sup> The third factor of the Wisconsin criteria is that “the petitioner assumed obligations of parenthood without expectation of financial compensation.”<sup>69</sup> In extensive dicta, the Court of Appeals in *L.B.* also cited the looser standard used in Massachusetts courts,

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<sup>67</sup> *In re Adoption of R.L.M.*, 138 Wn. App. 276, 289, 156 P.3d 940 (2007); *In re Dependency of D.M. & S.R.*, 136 Wn. App. 387, 397, 149 P.3d 433 (Div. 2, 2006).

<sup>68</sup> 155 Wn.2d at 708.

<sup>69</sup> *Id.*



which is that “the care was not provided primarily for compensation.”<sup>70</sup>

However, this Court expressly adopted the more rigid Wisconsin standard, which it presumably selected intentionally.

The intermediate appellate courts are bound to follow the most recent decisions of our Supreme Court.<sup>71</sup> Because this Court in *L.B.* expressly adopted the more rigid Wisconsin standard, Division One cannot now reject it in favor of the Massachusetts standard. In the Opinion, Division One admits that “Franklin received some monetary compensation,”<sup>72</sup> but repeatedly cites an American Law Institute (ALI) treatise that uses caretaking that “was not motivated primarily by [financial] assistance” as the standard for de facto parentage.<sup>73</sup> Despite use of the ALI treatise, the Opinion declares that “[o]ur Supreme Court explicitly recognized that the American Law Institute’s standards for de facto parentage were slightly different than the ones adopted in *L.B.*”<sup>74</sup>

## **2. The Requisite Statutory Gap was Lacking.**

In *L.B.*, this Court adapted the common law to address a gap in the existing statutory enactments.<sup>75</sup> The *L.B.* court found legislative silence when it comes to the rights of children “who are born into nontraditional families,”<sup>76</sup> and in

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<sup>70</sup> *In re Parentage of L.B.*, 121 Wn. App. 460, 483, 89 P.3d 271 (2004) (emphasis added), citing *E.N.O. v. L.M.M.*, 429 Mass. 824, 829, 711 N.E.2d 886 (1999).

<sup>71</sup> *State v. Berlin*, 80 Wn. App. 734, 740, 911 P.2d 414 (Div. 2, 1996), review granted by *State v. Berlin*, 129 Wn.2d 1019, 919 P.2d 62 (1996), and reversed on other grounds by *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

<sup>72</sup> Opinion at 20.

<sup>73</sup> Opinion at 18-19. (emphasis added).

<sup>74</sup> Opinion at 21, n.9.

<sup>75</sup> *L.B.*, 155 Wn.2d at 689.

<sup>76</sup> *Id.* at 694.

particular “regarding the interest of children begotten by artificial insemination,” such as *L.B.* was.<sup>77</sup> The *de facto* parent test may not be applied where a statutory remedy exists.<sup>78</sup> In *M.F.*, this Court stated that even though a stepparent cannot petition for parental status, that did equate to lack of a remedy.<sup>79</sup>

Here, A.F.J. was not born into a nontraditional family. At the time of his birth, Johnston and Franklin had separated and did not form any kind of family. Furthermore, there was a comprehensive statutory scheme governing dependency, foster care, and adoption, covering all but the first few weeks of his life. As the Attorney General pointed out, the legislature has established at least three statutory paths for foster parents to seek custody of foster children: third-party custody, guardianship, and adoption.<sup>80</sup>

### **3. Permanent and Unequivocal Parental Role in the Child’s Life.**

The fifth *L.B.* factor is that recognition of a *de facto* parent is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.<sup>81</sup>

A foster family has its source in state law and contractual arrangements.<sup>82</sup> Whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from

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<sup>77</sup> *Id.* at 695, n.9.

<sup>78</sup> *In re Parentage of M.F.*, 168 Wn.2d 528, 532, 228 P.3d 1270 (2010).

<sup>79</sup> *Id.* at 533.

<sup>80</sup> See RCW 13.34.155, RCW 13.36.030, ch. 26.33 RCW, and DSHS Amicus Br. at 19.

<sup>81</sup> 155 Wn.2d at 708.

<sup>82</sup> *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845, 97 S.Ct. 2094 (1977).

the outset.<sup>83</sup> Where the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties.<sup>84</sup>

Turning to Washington law, this Court found in *In re Dependency of J.H.*, and cited that finding in *L.B.*, that because the very nature of a foster placement is temporary, transitional, and for the purpose of supporting reunification with the legal parents, the law does not establish a right on the part of a foster parent to continue the relationship.<sup>85</sup>

A related consideration is that, ordinarily, procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another.<sup>86</sup> Here, however, such a tension is virtually impossible to avoid. Under Washington law, the natural parent of a foster child in voluntary placement has an absolute right to the return of her child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards.<sup>87</sup> Such standards reflect the constitutional protection accorded the natural family.<sup>88</sup> Moreover, the natural parent initially gave up her child to the State only on the express understanding that the child would be returned in those circumstances.<sup>89</sup>

Here, the dependency controlled the relationship between Franklin and

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 845-46.

<sup>85</sup> *L.B.*, 155 Wn.2d at 692 n.7, citing *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991).

<sup>86</sup> *Smith*, 431 U.S. at 846.

<sup>87</sup> See, e.g., RCW 13.34.180 *et seq.*

<sup>88</sup> See *Smith*, 431 U.S. at 846.

<sup>89</sup> See *id.*

A.F.J. beginning when A.F.J. was six weeks old. His foster placement, like all foster placements in this state, was by its nature temporary, transitional, and for the purpose of supporting reunification with the legal parent. That legal parent was Jackie Johnston, who had an express understanding that under the proper circumstances, her child would be returned to her—and not that her former intimate partner would accrue *de facto* parent’s rights in a parental relationship which Johnston could neither consent to and foster nor affirmatively encourage.

#### **4. Sufficient Length of Time to Establish Relationship.**

The Opinion asserts that “there is no time requirement included within the test announced by our Supreme Court.”<sup>90</sup> Although there is no rigid time requirement, *L.B.* does require that “the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.”<sup>91</sup> Because a *de facto* parent must meet all the *L.B.* factors, presumably the natural or legal parent must be consenting to and fostering the parent-like relationship during the entire time that the petitioner is establishing her bonded, dependent relationship with the child. Such prolonged consenting and fostering is the only way that the natural or legal parent could “affirmatively establish[] a family unit” that includes herself along with both the *de facto* parent and the child, as *L.B.* requires, and as happened in *L.B.* The family unit in *L.B.* persisted for six years after *L.B.* was born.<sup>92</sup> It was an affirmatively established family unit that the natural parent

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<sup>90</sup> Opinon at 20.

<sup>91</sup> 155 Wn.2d at 708.

<sup>92</sup> 155 Wn.2d at 684.

consented to and fostered for more than half a decade.

Here, however, DSHS intervened when A.F.J. was six weeks old, and A.F.J. had lived with Franklin for only a portion of those six weeks. Although the Opinion argues that Washington courts are not bound by the ALI standard that the *de facto* parent live with the child for not less than two years,<sup>93</sup> the only way the Court of Appeals could find that Franklin met *L.B.*'s requirement of sufficient time was by adding the time of A.F.J.'s dependency proceeding and foster care.<sup>94</sup> However, Johnston was unable to consent to and foster the relationship once DSHS intervened, nor did she affirmatively establish a family unit that included herself, and Franklin, and A.F.J. during A.F.J.'s early years.

### **C. Substantial Public Interest.**

As the Attorney General argued in its amicus brief submitted to Division One, allowing a foster placement to form a basis for recognizing the foster parent as a *de facto* parent undermines the dependency process and thwarts legislative intent to maintain the family unit.<sup>95</sup> The legislature has expressly declared "that the family unit is a fundamental resource of American life which should be nurtured."<sup>96</sup> In recognition of this principle, the legislature has further declared that "the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized."<sup>97</sup> This right to

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<sup>93</sup> Opinion at 20, n.9.

<sup>94</sup> "the period of time during which an individual served as a foster parent may be considered in deciding whether the *de facto* parentage test is met. Franklin parented A.F.J., albeit partly as a foster mother, past the age of three." Opinion at 21.

<sup>95</sup> DSHS Amicus Br. at 14.

<sup>96</sup> RCW 13.34.020.

<sup>97</sup> *Id.*

basic nurture “includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.”<sup>98</sup> In terminating a parent’s rights to their child, the trial court cannot base any part of its decision on the child’s chance for a better home with a new parent.<sup>99</sup>

However, if every parent in the state’s foster care system is potentially developing status as a *de facto* parent, it would enormously complicate the administration of the state foster care system in a time of unprecedented budget cuts. Does a dependency cease when a foster parent reaches *de facto* parent status, meaning that there is no longer a legal basis for continued court oversight? A *de facto* parent stands in legal parity with other legal parents.<sup>100</sup> A *de facto* parent therefore has a right to notice of an adoption or any dependency proceeding, has a right to be heard and introduce evidence at all proceedings, and a right to copies of Department records on the child. *See* RCW 13.04.020, RCW 13.34.090. How will the state know the point at which a foster parent has attained parity and accompanying parental rights, including the right to notice?

Here, Johnston recommended placing A.F.J. with Franklin, her former intimate partner, because Franklin and the child were familiar with each other. Such decisions that promote stable placement of children and the ultimate reunification of families are much less likely to occur if the natural parent knows that they might lead to foster parents being found *de facto* parents.

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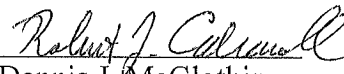
<sup>98</sup> *Id.*

<sup>99</sup> *In re Moseley*, 34 Wn. App. 179, 186, 660 P.2d 315 (1983).

<sup>100</sup> *L.B.*, 155 Wn.2d at 708.

RESPECTFULLY SUBMITTED June 15, 2011.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In re Parentage and Custody of:	)	
A.F.J.,	)	DIVISION ONE
A minor child.	)	
	)	No. 63919-6-1
Mary Franklin,	)	(consol. with No. 63982-0-1)
	)	
Appellant/Cross-Respondent,	)	OPINION PUBLISHED in Part
	)	
v.	)	
	)	
Jackie JohnSTon,	)	
	)	
Respondent/Cross-Appellant.	)	FILED: May 16, 2011
	)	

Dwyer, C.J. — This case concerns the interplay between foster parenting and the common law de facto parentage doctrine. Jackie Johnston, the biological mother of a newborn, encouraged Mary Franklin, Johnston's intimate partner, to develop a parent-like relationship with the child. Subsequently, the State initiated a dependency proceeding on the child's behalf and Franklin became the child's foster parent. Finding both that the de facto parentage doctrine is applicable in these circumstances and that the five-part test announced by our Supreme Court is met in this case, we affirm the trial court's determination that Franklin is the child's de facto parent.<sup>1</sup>

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<sup>1</sup> The parties' remaining assignments of error are addressed in the unpublished portion of



I

The facts are these.<sup>2</sup> Mary Franklin, born in 1959, and Jackie Johnston, born in 1966, began dating in 2002. During the course of their relationship, Johnston became addicted to crack cocaine. As a result of Johnston's addiction, the couple's relationship was difficult and sporadic. At Franklin's insistence, Johnston entered treatment programs on several occasions. None were successfully completed. The women's relationship was made more difficult because Franklin lived in Washington while Johnston lived in California.

In early 2005, during a period when the couple was separated, Johnston relapsed and became pregnant with A.F.J. Johnston reached out to Franklin for help and moved to Washington. Shortly after Johnston and Franklin reunited, Franklin learned that Johnston was pregnant. Franklin assisted Johnston in obtaining prenatal care and drug addiction treatment. During the course of the pregnancy, when Johnston was not in treatment, she lived primarily with Franklin.

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this opinion. Finding no error, we affirm the trial court's orders in all respects.

<sup>2</sup> In her cross appeal, Johnston assigns error to several of the trial court's findings of fact. Generally, findings of fact "are viewed as verities, provided there is substantial evidence to support the findings." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Hill, 123 Wn.2d at 644.

The trial record provided to us is incomplete. We have been provided with none of the exhibits admitted at trial. Moreover, we have not been provided with a record of the testimony of numerous witnesses. In such a situation, our ability to fairly evaluate the findings in light of the record before the trial court is compromised. Thus, we treat the findings as verities. See Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 90, 173 P.3d 959 (2007); St. Hilaire v. Food Servs. of Am., Inc., 82 Wn. App. 343, 351-52, 917 P.2d 1114 (1996); Rekhi v. Olason, 28 Wn. App. 751, 753, 626 P.2d 513 (1981); Gaupholm v. Aurora Office Bldgs., Inc., 2 Wn. App. 256, 257, 467 P.2d 628 (1970). This approach to appellate review of trial court factual determinations is one of long standing. See Apostle v. Lillions, 8 Wn.2d 118, 121, 111 P.2d 789 (1941); Deller v. Long, 96 Wash. 372, 373, 165 P. 98 (1917).

In October 2005, Johnston, still pregnant, relapsed again. Johnston was then admitted into the Perinatal Treatment Services (PTS) facility in Tacoma, where she remained until after A.F.J.'s birth. A.F.J. was born on November 20, 2005. His full given name includes the surnames of both Franklin and Johnston.

Johnston and A.F.J. resided at PTS until late December, although Franklin took A.F.J. home with her on occasion. Johnston later reported that, because PTS would not allow Franklin to take A.F.J. home with her more frequently, she left PTS earlier than recommended.

Upon leaving PTS, Johnston rented an apartment for the month of January. However, she used the apartment for only a short time. Instead, Johnston and A.F.J. stayed with Franklin over the December holidays and lived with Franklin for most of the month of January. Franklin and Johnston together attended A.F.J.'s doctor appointments. Franklin participated in the decision to have A.F.J. circumcised.

At the end of January, about one month after leaving PTS, Johnston had a severe relapse. Franklin, concerned about the welfare of A.F.J. and Johnston, called Child Protective Services. A.F.J. was removed from the home. He was, however, returned to Franklin's care several days later. The State initiated a dependency action on A.F.J.'s behalf.

In April 2006, the trial court required Franklin to become licensed as a foster parent in order to maintain care of A.F.J. Franklin procured the requisite

license, becoming A.F.J.'s foster mother in September 2006. She cared for A.F.J. throughout the licensing process.

Franklin accepted foster care payments from September 2006 through April 2008. After April 2008, the foster care payments ceased; however, they were resumed in February 2009. Franklin did not deposit any of the checks sent to her after April 2008.

The State filed a termination petition against both Johnston and A.F.J.'s unknown biological father, who did not respond to the petition. His rights were terminated by default.

Franklin then filed petitions requesting either nonparental custody of A.F.J. or the establishment of de facto parentage. The nonparental custody, de facto parentage, and dependency proceedings were linked and accepted into the Unified Family Court. Subsequently, the termination proceeding was continued pending the resolution of Franklin's nonparental custody and de facto parentage actions.

A trial was then held on the nonparental custody and de facto parentage actions. In April 2009, at the conclusion of trial, the court made numerous oral findings and rulings. In May 2009, the trial court entered several written orders consistent with the court's prior rulings. The trial court entered findings of fact and conclusions of law regarding nonparental custody and de facto parentage, wherein the trial court found that Johnston was a fit mother. The trial court

concluded that Franklin did not prove either that Johnston was an unfit mother or that it would be to A.F.J.'s detriment to be placed in Johnston's custody, and, as a result, there was no basis to grant nonparental custody to Franklin. The trial court also concluded that Franklin had demonstrated that she was A.F.J.'s de facto parent.

The trial court ordered a temporary parenting plan that provided for the parties to equally share residential time and to engage in joint decision-making. Johnston was named the default decision-maker in the event that they were unable to make joint decisions. The trial court also ordered Franklin to pay \$215 per month in child support to Johnston, granting a deviation from the child support schedule based on the parties' equal residential arrangement. In addition, the trial court awarded \$20,000 in attorney fees to Johnston.

Franklin appeals, raising issues regarding the award of attorney fees, the order of child support, and the parenting plan. Johnston cross appeals, contending that Franklin cannot be A.F.J.'s de facto parent.

## II

We first consider the decisive issue in this case. Johnston contends on cross appeal that the trial court erred by finding that Franklin, A.F.J.'s foster mother, was A.F.J.'s de facto parent. We disagree.<sup>3</sup>

Our Supreme Court first recognized the de facto parentage doctrine in In

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<sup>3</sup> At our request, the Department of Social and Health Services (DSHS), Legal Voice, and the American Academy of Matrimonial Lawyers submitted amici curiae briefs. The excellent briefing submitted by amici was helpful to our analysis of this important issue, and the court is grateful for the professionalism displayed by amici's counsel.

re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005). There, the court examined whether a biological mother's former lesbian partner, who was neither biologically related to the child nor an adoptive parent of the child, had standing to petition "for a determination of coparentage" of the child. L.B., 155 Wn.2d at 683-84, 688-89. The two women at issue therein were in a long-term committed relationship when the child was born, the decision to add the child to the relationship was a joint decision, the women held themselves and the child out to the public as a family, and the women co-parented the child until their relationship ended when the child was six years old. L.B., 155 Wn.2d at 683-84.

After their relationship ended, the biological mother terminated all contact between her former partner and the child. The former partner petitioned for establishment of parentage, asking that she be declared the child's legal parent pursuant to the Uniform Parentage Act (UPA), chapter 26.26 RCW; that she be declared a parent pursuant to equitable estoppel principles or recognized as a de facto parent; or that she be allowed statutory third party visitation rights. L.B., 155 Wn.2d at 685.

Relying on its equitable powers and recognizing the common law status of a de facto parent, our Supreme Court determined that the former partner had standing to petition "for a determination of co-parentage" if she could establish that she had a de facto parent relationship with the child. L.B., 155 Wn.2d at 683. The court announced a common law remedy recognizing that, "while

attempting to give structure and predictability to [parentage] determinations, neither the UPA nor corresponding statutes defining parental rights and responsibilities purport to preclude the operation of the common law when addressing situations left unanswered after conducting a strict statutory inquiry.” L.B., 155 Wn.2d at 696. While the “UPA undeniably provides a statutory, and the most common, avenue by which courts adjudicate a person a parent in this state[,] . . . it inevitably did not contemplate nor address every conceivable family constellation.” L.B., 155 Wn.2d at 688 n.5. Thus, the de facto parentage doctrine was needed “to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy.” L.B., 155 Wn.2d at 707. The court explained that, until the time that the legislature chooses to act, it is the duty of the court to “endeavor to administer justice according to the promptings of reason and common sense.” L.B., 155 Wn.2d at 707 (quoting Bernot v. Morrison, 81 Wash. 538, 544, 143 P. 104 (1914)).

The court then set forth the elements that a party claiming de facto parent status must establish: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded,

dependent relationship, parental in nature; and (5) the petitioner has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life. L.B., 155 Wn.2d at 708. The court held that

a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise. As such, recognition of a person as a child's *de facto* parent necessarily "authorizes [a] court to consider an award of parental rights and responsibilities . . . based on its determination of the best interest of the child." A *de facto* parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child at the center of any such dispute.

L.B., 155 Wn.2d at 708-09 (alteration in original and citations omitted).

Subsequently, our Supreme Court held that the *de facto* parentage cause of action is unavailable in the stepparent-stepchild context. In re Parentage of M.F., 168 Wn.2d 528, 532, 228 P.3d 1270 (2010). Before M.F. was two years old, her natural parents divorced and her mother married John Corbin. M.F., 168 Wn.2d at 529-30. Several years later, her mother and Corbin divorced, but Corbin continued to have regular contact with M.F. until she was 12. M.F., 168 Wn.2d at 530. Corbin subsequently petitioned to be recognized as M.F.'s *de facto* father.<sup>4</sup> M.F., 168 Wn.2d at 530.

In denying Corbin's request, the Supreme Court explained that "the factors prompting us to recognize a remedy in L.B. are not present in this case, as no statutory gaps exist to fill." M.F., 168 Wn.2d at 532. Rather, the court

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<sup>4</sup> Corbin petitioned to become M.F.'s *de facto* father after M.F. arrived at Corbin's house "bruised in intimate places, apparently from being 'tickled' by her mother's new boyfriend." M.F., 168 Wn.2d at 536 (Chambers, J., dissenting).

reasoned, “[a]n avenue already exists for a stepparent seeking a legal, custodial relationship with a child. The legislature has created and refined a statutory scheme by which a stepparent may obtain custody of a stepchild.” M.F., 168 Wn.2d at 532. The court noted that

[t]he statutory void confronting us in L.B. is absent here. As did the parties in L.B., [M.F.’s natural parents] chose to have children and form a family. But unlike in L.B., [the natural parents’] status as legal parents was established at the outset. In contrast, Corbin entered M.F.’s life as a stepparent, a third party to M.F.’s two existing parents.

M.F., 168 Wn.2d at 532. The court determined that chapter 26.10 RCW, the third party custody statute, provided an adequate statutory remedy for Corbin. The court held that the “intertwined judicial and statutory history [of third party custody actions] illustrates the legislature’s ongoing intent to create laws accommodating stepparents who seek custody on or following dissolution. Though our statutory scheme does not permit a stepparent to petition for parental status, this does not equate to a lack of remedy.” M.F., 168 Wn.2d at 533.

Because no statutory void exists with respect to stepparent-stepchild relationships, the court determined that it “cannot apply an equitable remedy that infringes upon the rights and duties of M.F.’s existing parents.” M.F., 168 Wn.2d at 532. The court emphasized that, in addition to the existence of a statutory remedy, its decision was based on the fact that the court was “faced with the competing interests of parents—with established parental rights and duties—and



a stepparent, a third-party who has no parental rights.” M.F., 168 Wn.2d at 532.

The court concluded:

[H]ere, the petitioner is a third-party to the two already existing parents, which places him in a very different position than the respondent in L.B. These differences, as well as the presence of a statutory remedy available to Corbin, support our conclusion that the de facto parentage doctrine should not extend to the circumstances in this case.

M.F., 168 Wn.2d at 534.

Turning to the issues presented herein, “the correct starting point is not whether the de facto parent test has been met” but, rather, whether that test is applicable here; the de facto parentage test is relevant only if we first decide “that the de facto parentage doctrine applies to the circumstances presented in this case.” M.F., 168 Wn.2d at 534. Thus, only if we first determine that the de facto parentage doctrine is available in a situation such as this must we then turn to the question of whether Franklin’s proof satisfies the de facto parentage test.

Johnston contends that the de facto parentage doctrine cannot be applied to the circumstances of this case for two reasons, one general and the other specific to this case. First, Johnston contends that foster parents may never qualify as de facto parents and, thus, Franklin cannot be A.F.J.’s de facto parent. Second, Johnston contends that there were statutory remedies available to Franklin, thus precluding application of the de facto parentage doctrine. We find neither contention persuasive.

We begin by addressing Johnston’s assertion that a foster parent can

*never* qualify as a de facto parent.<sup>5</sup> Johnston contends that two Washington decisions categorically exclude foster parents from qualifying as de facto parents. See In re Custody of A.C., 137 Wn. App. 245, 153 P.3d 203 (2007), reversed on other grounds, 165 Wn.2d 568, 200 P.3d 689 (2009); Blackwell v. Dep't of Soc. & Health Servs., 131 Wn. App. 372, 127 P.3d 752 (2006).

In A.C., a nonparental custody action, the trial court awarded custody of a young boy to his foster parents rather than to his mother. 137 Wn. App. at 253. The foster parents had not known A.C. prior to the State removing him from his mother's care; instead, they met A.C. only as a result of traditional foster care placement. A.C., 137 Wn. App. at 250. In addressing the effect of the trial court's determination that the foster parents were A.C.'s "psychological parents," the Court of Appeals noted that the mother "never consented to [the foster parents'] custody of A.C. Consequently, [the foster parents] cannot use the status of psychological parents to interfere with [the mother's] constitutionally protected rights." A.C., 137 Wn. App. at 261 (citing In re Custody of Shields, 157 Wn.2d 126, 146, 136 P.3d 117 (2006)).

The circumstances in Blackwell were quite different. In that case, the Blackwells were foster parents who were investigated for child abuse and who had their foster care license revoked. Blackwell, 131 Wn. App. at 374. They subsequently brought a tort claim against the State alleging negligent

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<sup>5</sup> This question is distinct from the question of whether the period of time that a person was a foster parent can be considered in determining whether the elements of the de facto parentage test are satisfied. We address that question later in this opinion.

investigation, a cause of action afforded only to children and parents. Blackwell, 131 Wn. App. at 375. The Blackwells argued that the court should “extend the duty [and, thus, the cause of action] to foster parents, especially those who claim to be de facto or psychological parents.” Blackwell, 131 Wn. App. at 376. We held that the foster parents could not satisfy the elements of the de facto parentage test:

The record before us demonstrates that the Blackwells only meet the second part of the test. Certainly parts one and three are not established. The Blackwells are not the natural or legal parents of D.R. and they were paid to serve as foster parents. In addition, the record before the court does not support a holding that an actual bond developed between D.R. and the Blackwells, given D.R.’s desire to leave the Blackwell home.

Blackwell, 131 Wn. App. at 378.

Blackwell does not support Johnston’s contention that *all* individuals who serve as foster parents are categorically excluded from being de facto parents. Otherwise, we would not have found it necessary to determine whether the Blackwells could satisfy the elements of the de facto parentage test. Nor does A.C. support Johnston’s contention, given that the court determined that the child’s mother had not consented to the relationship; as such, the five-part de facto parentage test could not be met. See L.B., 155 Wn.2d at 708 (part one). Indeed, none of the cases cited by Johnston indicate that foster parents are necessarily unable to satisfy the elements of L.B.’s five-part test. We can discern no reason to categorically exclude those individuals serving as foster

parents from seeking de facto parent status. To the contrary, our decisions indicate that each determination of de facto parentage should be made based on the particular facts of each case, rather than by applying sweeping, categorical rules. As an equitable remedy, such a question is properly left to a case-specific inquiry.

Nevertheless, Amicus DSHS opines that, as a general matter, allowing foster parents to be recognized as de facto parents “undermines the dependency process and contravenes legislative intent to maintain the family unit.” Amicus DSHS Br. at 18. Foster parents generally have neither a right to intervene in dependency proceedings nor a very high likelihood of being granted permissive intervention in such proceedings because “a foster parent’s adversarial participation in a dependency hearing has a tendency to shift the focus of the proceeding from the ability of the natural parent to care for the child to a comparison of the natural parent to the foster parent.” In re Welfare of Coverdell, 39 Wn. App. 887, 890-91, 696 P.2d 1241 (1984). Similarly, the American Law Institute has cautioned, “[r]elationships with foster parents are . . . generally excluded . . . because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children.” Am. Law Inst., Principles of the Law of Family Dissolution: Analysis & Recommendations § 2.03 cmt. (c)(ii), at p. 120 (2003).

DSHS’s concerns are legitimate. However, such concerns do not arise in

a situation such as this, where a parent-child relationship between the individual seeking de facto parent status and the child *preexisted* the fostering relationship. In fact, the American Law Institute, after noting the above-stated reservations, nevertheless observes that an individual who served in a parental role to a child prior to becoming a foster parent to that child would likely qualify as a de facto parent. Am. Law Inst., supra, § 2.03 cmt. (c)(ii), ill. 21, at p. 121. The policy concerns raised by DSHS are not implicated where, as here, the parent-child relationship was nurtured prior to any fostering relationship. These policy concerns being inapplicable in this case, we need not further consider them.

We next turn to Johnston's contention that the de facto parentage doctrine was inapplicable here because statutory remedies were available to Franklin. Johnston argues that Franklin could have become A.F.J.'s legal custodian through a nonparental custody action or could have adopted A.F.J. and, thus, that Franklin cannot avail herself of the remedy provided by the de facto parentage doctrine. Indeed, where statutory remedies are available, the common law de facto parentage doctrine cannot be employed. M.F., 168 Wn.2d at 532-33. Our Supreme Court has determined that such remedies constitute suitable alternatives to de facto parent status in the stepparent context, where the child already has two legal parents. M.F., 168 Wn.2d at 532-33.

Contrary to Johnston's contention, however, no statutory remedies were available to Franklin. As with the petitioner in L.B., Franklin could not have

successfully sought parental status pursuant to the UPA because she and Johnston were engaged in a same-sex relationship that is not contemplated by the UPA. 155 Wn.2d at 688 n.5. In addition, as the trial court herein found, adoption was not an available remedy because Franklin could not have reasonably sought to complete an adoption in the mere two months between A.F.J.'s birth and the State's initiation of the dependency action.<sup>6</sup> Moreover, Franklin attempted to obtain custody of A.F.J. through a nonparental custody action, but she was unsuccessful because the trial court found that Johnston was a fit parent.<sup>7</sup> As with the petitioner in L.B., Franklin has no statutory remedy whereby she can attempt to have her relationship *with a child whom she has raised since birth* legally recognized. Because a statutory gap exists in this case, the de facto parentage doctrine can be applied to the circumstances herein.

### III

Before applying the five-part test to the facts herein, however, we must determine whether the period of time during which an individual is serving as a foster parent may be considered for purposes of the de facto parentage test.

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<sup>6</sup> Franklin was prepared to adopt A.F.J. had Johnston's parental rights been terminated.

<sup>7</sup> Resort to the nonparental custody statute, chapter 26.10 RCW, is available to any person. As such, it was available to the petitioner in L.B. There is no indication that the petitioner in L.B. made any effort to proceed under that statute, but the potential availability of such a remedy was not a bar to her petition for de facto parent status. See 155 Wn.2d at 712 (remanding to the trial court for a determination of whether the petitioner meets the five-part test). The facts of this case provide an even more compelling basis to find that the nonparental custody statute does not provide an adequate remedy, given that this remedy was expressly disallowed by the trial court.

Johnston contends that the period of time that the fostering relationship existed must be excluded from consideration. In support of her contention, she cites as persuasive authority a recent decision of the Alaska Supreme Court, wherein the court held that the trial court had properly excluded the time that the petitioner was a foster parent when analyzing whether the petitioner was the child's psychological parent. Osterkamp v. Stiles, 235 P.3d 178, 187 (Alaska 2010).

In that case, the female foster parent of a child, Simon, chose to adopt him while her male domestic partner, Osterkamp, declined to adopt him. Osterkamp, 235 P.3d at 181-82. Osterkamp later sought partial custody of Simon on the basis that he was Simon's psychological parent. The Alaska Supreme Court reasoned that the time served as a foster parent may not be considered for purposes of establishing psychological parent status because

[a] foster parent serves a vital but inherently temporary role in a child's life. The ultimate goal in foster care is for the child to either be returned to the biological parents in appropriate circumstances or adopted, either by the foster parents or by another third party. The temporary nature of foster care along with the compensation for services associated with it make it more difficult to ascertain whether a foster parent has become a psychological parent or is serving the child's needs in a different capacity.

Osterkamp, 235 P.3d at 187. Moreover, Simon had been adopted by the female foster parent and "[t]he purpose of an adoption decree is to vest all legal parental rights with the adoptive parent or parents, to the exclusion of all others." Osterkamp, 235 P.3d at 187.

The reasoning in Osterkamp is unpersuasive as applied to the

circumstances presented herein, where the parent-child relationship between Franklin and A.F.J. was initiated and encouraged by Johnston before and beyond the fostering relationship itself and where there is evidence that the relationship between Franklin and A.F.J. was, at its inception, intended to be permanent rather than temporary. Osterkamp notwithstanding, Johnston offers no reason that persuades us to mandate that the period of time during which Franklin was A.F.J.'s foster mother be ignored when analyzing whether Franklin's proof satisfies the five-part test. To be sure, we decline to hold that the time period during which an individual seeking de facto parent status served as a foster parent must *a/ways* be considered in evaluating the five-part test. Rather, we are persuaded that this time period may be considered where the circumstances of the case warrant such consideration, as is the case herein. This holding does not compel a trial court to find that any particular component of the L.B. test is met but, rather, allows the court to consider all relevant circumstances in determining whether an individual's proof satisfies the de facto parentage test.

#### IV

We now turn to the question of whether the evidence of Franklin's relationship with A.F.J. satisfies the five-part de facto parentage test.

The first part of the five-part test, that the natural or legal parent consented to and fostered the parent-like relationship, is met. Johnston had a



romantic relationship with Franklin, notwithstanding that this relationship was unstable due to Johnston's drug addiction. Johnston renewed her relationship with Franklin upon learning that she was pregnant. Johnston testified that before A.F.J. was born, she had continued reaching out to Franklin because she was "nine months pregnant, and . . . wanted [Franklin] to be there." Report of Proceedings (March 30, 2009) at 64. Franklin obtained prenatal care and drug addiction treatment for Johnston in order to ensure the child's well-being. Once A.F.J. was born, Franklin took him home from PTS as frequently as she was allowed; indeed, Johnston testified that she had left PTS earlier than recommended because the facility would not allow Franklin to take A.F.J. more often. Johnston and Franklin resided together with A.F.J. after Johnston left PTS. Johnston testified that Franklin was co-parenting A.F.J. before the State intervened. As the trial court found, Johnston requested that Franklin be involved in naming A.F.J., and Franklin participated in the decision to circumcise him. When A.F.J. was removed from Johnston's custody, Johnston requested that A.F.J. be placed with Franklin. At this time, he was only two months old. Johnston continued supporting Franklin's relationship with A.F.J. even after the State became involved, in part because she believed that she and Franklin would stay together. Both before and after the State's involvement and Franklin's status as a foster parent, Johnston encouraged and fostered Franklin's parental role in A.F.J.'s life.

The second part of the test, that the petitioner and the child lived together in the same household, is likewise satisfied. Johnston and A.F.J. lived predominantly with Franklin after Johnston left PTS, prior to the State taking custody of A.F.J. Moreover, after the State filed the dependency action, A.F.J. continued to reside with Franklin, a circumstance that Johnston supported. Franklin did not become A.F.J.'s foster mother until almost eight months after the State intervened, and then only at the urging of the court. As the trial court found, A.F.J. has lived with Franklin for 99 percent of his life.

The third part of the test, that the petitioner assumed the obligations of parenthood without expectation of financial compensation, is also satisfied. Franklin assumed parental duties before A.F.J. was even born. After A.F.J.'s birth, Franklin continued to fulfill a parental role and maintained her position as the primary wage earner. Rather than expecting financial compensation, she assumed financial obligations. Knowing that Johnston had no employment, Franklin could not have expected that she would be reimbursed for her efforts. Prior to becoming a foster parent, Franklin "expressed the desire to provide long term care for [A.F.J.]." Clerk's Papers (CP) at 927.

Pursuant to the laws in place at the time, Franklin was required to become a foster parent in order to maintain care of A.F.J.<sup>8</sup> As a consequence of

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<sup>8</sup> RCW 13.34.130 requires placement of dependent children only with particular individuals. At the time that A.F.J. was removed from Johnston's custody, RCW 13.34.130 did not allow Franklin to obtain custody, control, and care of A.F.J. without becoming licensed as a foster parent. Former RCW 13.34.130 (2003). This statute was amended in 2007 to allow placement of children with a non-relative when that person is a "suitable person" who has a preexisting relationship with the child or the child's family. RCW 13.34.130; Laws of 2007, ch.

becoming A.F.J.'s foster parent, Franklin received funds from the State. The American Law Institute provides a useful explanation of the reason that such a situation does not proscribe de facto parent status:

The requirement that an individual have performed caretaking functions primarily for nonfinancial reasons does not rule out caretakers who may qualify for financial assistance to care for the child but whose caretaking role was not motivated primarily by that assistance. Thus, for example, family members who take children into their homes primarily out of family affinity may be de facto parents even if, as a result of taking a child into their home, they are able to qualify for welfare benefits, foster-care payments, or other forms of financial assistance.

Am. Law Inst., supra, § 2.03, cmt. (c)(ii), at p. 120. The American Law Institute provides two especially useful illustrations. The first illustration describes an ordinary fostering relationship:

Wayne and Pattie are foster parents, who have cared for 10-year-old Ford for the past two years.

They are not de facto parents, because their caretaking arrangement is a financial one.

Am. Law Inst., supra, § 2.03, cmt. (c)(ii), ill. 19, at p. 121. In contrast, the second illustration describes a more unusual situation that nevertheless involves a fostering relationship:

Since her birth, three-year-old Simone has lived with and been cared for by her grandmother, Julia, while her mother, Fortune, drifted in and out of her life. Recently, at the suggestion of a social worker, Julia applied for a state foster-parent license. She is now receiving foster-care payments under a relative foster-care program.

Julia may qualify as a de facto parent, even though she

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412, § 2. Had this amendment been in effect at the time that the State removed A.F.J. from Johnston's custody, Franklin would not have been statutorily-required to become a foster parent in order to continue caring for A.F.J.

receives foster-care payments to help support Simone, because the caretaking arrangements arose for familial reasons and not primarily for financial ones.

Am. Law Inst., supra, § 2.03, cmt. (c)(ii), ill. 21, at p. 121. The distinction between these two types of fostering relationships is of significant consequence in determining whether a foster parent can establish de facto parent status.

As evidenced by the circumstances presented herein, Franklin did not assume the obligations of care for A.F.J. with the expectation that she would receive compensation. Prior to becoming licensed as a foster parent, Franklin cared for A.F.J. for almost eight months without any compensation. Franklin was not a nanny or a child-care provider. Rather, she was A.F.J.'s parental figure while Johnston fought to overcome her drug addiction. That Franklin received some monetary compensation does not change the fact that she assumed the obligations and responsibilities of parenting A.F.J. without any expectation that she would be financially compensated for such care.

The fourth part of the test, that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature, is also satisfied. A.F.J. was three and a half years old at the time of trial, and Franklin had parented him since his birth. Proof was abundant that the two are bonded in a parent-child, dependant relationship. As Johnston herself recognizes, Franklin is a parent to A.F.J., and A.F.J. believes Franklin to be one of his mothers. One social worker noted that

A.F.J. had “clearly developed a primary attachment to [Franklin] as his parent.” CP at 949.

Nevertheless, Johnston contends that, by virtue of the State taking legal custody of A.F.J. when he was only two months old, Franklin cannot have established the requisite parental relationship over a sufficient period of time. We disagree. To begin, there is no time requirement included within the test announced by our Supreme Court.<sup>9</sup> Any stringent time requirement would flout the fact-specific nature of the de facto parentage inquiry. Moreover, as we discussed above, the period of time during which an individual served as a foster parent may be considered in deciding whether the de facto parentage test is met. Franklin parented A.F.J., albeit partly as a foster mother, past the age of three. She has performed the primary parental role for almost all of A.F.J.'s life and, in that capacity, has established a bonded, dependent relationship with A.F.J.

Franklin also satisfies the fifth part of the test, which requires that the petitioner has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life. The trial court found that Franklin “has been devoted to him and has fully and unequivocally assumed

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<sup>9</sup> Johnston implies that the relationship must have been developed over a period of at least two years. However, no such time requirement is included within the test announced by our Supreme Court. Rather, the requirement that the alleged de facto parent live with the child for not less than two years is contained within the American Law Institute's standards. See Am. Law Inst., supra, § 2.03, at 107-08, 119. Our Supreme Court explicitly recognized that the American Law Institute's standards for de facto parentage were slightly different than the ones adopted in L.B., and the court did not incorporate any particular time prerequisite into its test. L.B., 155 Wn.2d at 706 n.24.

a parental role” and then concluded that “if she does not qualify as a *de facto* parent under the analysis in L.B., then no one would.” CP at 711. Johnston contends that Franklin was not properly found to be a *de facto* parent because the trial court failed to explicitly find that Franklin undertook a *permanent* parental role. Although the trial court did not utilize each of the words listed in L.B.—permanent, unequivocal, committed, and responsible—the trial court’s findings imply, and the evidence presented at trial supports, a determination that Franklin undertook a permanent parental role, acted as a responsible parent, and was fully committed to A.F.J.

Each part of the test that must be met to establish that an individual is a *de facto* parent is met here. Applying the *de facto* parentage doctrine to these unusual circumstances does not require us to extend the doctrine beyond its intended scope and does not open the floodgates of *de facto* parentage claims to those undeserving of such a classification. RCW 13.34.020 declares that “the family unit is a fundamental resource of American life which should be nurtured.” Our holding today is consistent with this public policy goal. Recognizing Franklin’s relationship with A.F.J. as a *de facto* parent-child relationship nurtures the family unit that the parties intentionally formed.<sup>10</sup> Franklin is one of A.F.J.’s

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<sup>10</sup> Johnston’s claim that such a result violates the biological parent’s constitutional rights has already been debunked. Our Supreme Court explicitly held that the multi-part *de facto* parentage test adequately protects a biological parent’s constitutional rights. L.B., 155 Wn.2d at 710-12 (holding that a *de facto* parent’s rights do not infringe on the fundamental liberty interests of the other legal parent in a family unit because *de facto* “status can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family”).

Johnston also contends that Franklin cannot properly be found to be A.F.J.’s *de facto*

mothers, and she should be recognized as such.

We affirm the trial court's determination that Franklin is A.F.J.'s de facto parent.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

V

Franklin contends that the trial court erred by ordering her to make child support payments to Johnston. We disagree.

A trial court's decision setting child support is reviewed for an abuse of discretion. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). "This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances." In re Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002).

Franklin asserts that she was not properly notified that child support would be sought. However, in her petition for establishment of de facto parentage, Franklin herself sought entry of a child support order. Where an individual seeks rights as a de facto parent, that individual must also accept the responsibilities that accompany parent-child relationships. Such responsibilities

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parent because A.F.J.'s biological father was never notified of the proceedings. However, on July 26, 2007, the unknown father's parental rights were permanently terminated by order of the court after default. Accordingly, A.F.J.'s biological father had no right to be notified of further proceedings.

include child support.

Franklin also asserts that she should have been allowed to update her financial declaration before the trial court calculated the amount of child support. However, Franklin cites no authority establishing that it was improper for the trial court to use the financial declarations available, which had been submitted by the parties only two months prior to the trial court's child support calculation.

The order of child support shows that the trial court considered the parties' equal residential schedule and, as a result, granted a deviation from the child support schedule, as permitted by RCW 26.19.075.<sup>11</sup> As the trial court's calculation was within the range of the evidence presented, the calculation was not arbitrary as Franklin contends. Franklin has not demonstrated any error in the order of child support.

## VI

Franklin next contends that the trial court erred by entering a parenting plan that provides Johnston with sole decision-making authority in the event that the parties cannot make joint decisions. We disagree.

A trial court's parenting plan is reviewed for an abuse of discretion.

Mansour v. Mansour, 126 Wn. App. 1, 8, 106 P.3d 768 (2004). Franklin argues that the trial court, by granting Johnston sole decision-making authority in the event that the parties cannot make joint decisions, ignored our Supreme Court's

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<sup>11</sup> Franklin contends that she should not owe child support payments for the period of time that A.F.J.'s dependency was ongoing because the trial court did not intend to require such payments. However, the trial court's order is perfectly clear that Franklin was to begin paying child support on October 1, 2009. Franklin's contention fails.



announcement that de facto parents are in legal parity to legal parents. Contrary to Franklin's belief, the trial court did not reduce Franklin's status as A.F.J.'s legal parent by awarding sole decision-making authority to Johnston in the event that joint decision-making failed. Such decisions are made by the trial court in many parenting plans. Whether a parent is a biological parent or a de facto parent, the trial court has the authority to assign decision-making authority to either or both parents when entering a parenting plan.

Furthermore, our Supreme Court held that a de facto parent "is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child." L.B., 155 Wn.2d at 708-09. Franklin does not explain why the trial court's decision was not in A.F.J.'s best interests, other than making unsupported accusations that Johnston will relapse into her drug addiction and that Johnston presents a domestic violence threat. The trial court did not find that there were any domestic violence concerns. Moreover, the trial court found that Johnston was a fit parent whose parental participation would be of great benefit to A.F.J. Accordingly, the trial court did not abuse its discretion in awarding to Johnston sole decision-making authority in the event that the parties cannot successfully make joint decisions.

## VII

Franklin next contends that the trial court erred by awarding attorney fees to Johnston pursuant to both RCW 26.26.140, the attorney fee provision

contained within the UPA, and RCW 26.10.080, the provision authorizing an award of attorney fees in nonparental custody actions.

Franklin is correct that the UPA does not provide a basis for an award of attorney fees in this case. The UPA is inapplicable to Franklin's relationship with A.F.J. See L.B., 155 Wn.2d at 688 n.5 ("[I]n this court the parties agree that our statutory parentage determinations, under the UPA, fail to directly address this dispute."). Were the UPA applicable, a de facto parentage claim would be unavailable to Franklin, as such a claim is based on a common law doctrine intended to provide a remedy for a situation not addressed by the UPA. L.B., 155 Wn.2d at 706-07. Considering that the UPA does not apply, attorney fees cannot be awarded pursuant to RCW 26.26.140 in a de facto parentage action. See W. Cmty. Bank v. Helmer, 48 Wn. App. 694, 740 P.2d 359 (1987) (reversing an award of attorney fees granted in an action dividing the property of a meretricious relationship because the award was based on the attorney fee provision contained within the dissolution statute, which was inapplicable).

However, Franklin brought a nonparental custody action in addition to a de facto parentage claim. Franklin did not prevail on that claim. The trial court is statutorily authorized to award attorney fees in such a circumstance. RCW 26.10.080. Thus, the trial court herein properly awarded attorney fees in favor of Johnston pursuant to RCW 26.10.080.

Where more than one claim is brought, and fees are not recoverable on

all claims, the trial court ordinarily must, if possible, segregate the fees applicable to each claim. Smith v. Behr Process Corp., 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002). There is no evidence in the record that any such segregation was attempted. However, Franklin neither objected on this basis in the trial court nor in any other manner afforded the trial court an opportunity to correct such error.

Franklin's contention that she raised such an objection below is not supported by the record. In her response to Johnston's request for an award of interim attorney fees, made eight months before the trial court's posttrial ruling, Franklin objected on the following bases: (1) that Franklin should not have to bear the entire expense of litigation; (2) that an award of interim attorney fees could not be based on the parties' disparate financial circumstances; (3) that an award of attorney fees should not be made prior to a final determination; and (4) that an award of interim attorney fees would incentivize Johnston to continue litigation and undercut Franklin's attempt to achieve a settlement. In that pleading, Franklin also opined that, because the nonparental custody action and the de facto parentage action had recently been consolidated, the trial court "would have to be able to discern which part of the attorney fees related to the third party custody action and which to the parentage action" prior to a future award of attorney fees. CP at 109-10. To the extent that this could be considered as an objection to any future award of attorney fees, Franklin acted

at variance with this position by accepting at the end of trial, *without objection*, her obligation to pay a portion of Johnston's attorney fees. Indeed, Franklin raised no objection to the award of fees made at that stage of the proceeding but merely requested additional time to pay the award.<sup>12</sup> Under these circumstances, Franklin did not properly preserve the issue for appeal. RAP 2.5(a). Accordingly, appellate relief is not warranted.

### VIII

Johnston requests an award of attorney fees on appeal. However, there is no statutory basis on which to award such fees. RCW 26.26.140, the UPA attorney fee provision, is not applicable in de facto parentage actions. Moreover, RCW 26.10.080 does not provide a basis to award attorney fees in this appeal because the issues raised on appeal are unrelated to the nonparental custody action. Nor do we find that Franklin's appeal is frivolous or that she acted in

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<sup>12</sup> The superior court judge who ordered Franklin to pay interim attorney fees was a different judge than the trial judge who entered the posttrial ruling ordering Franklin to pay Johnston \$20,000 in attorney fees.

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an improper manner justifying an award of attorney fees. Accordingly, we deny Johnston's request.

Affirmed.

Dupre, C. S.

We concur:

Leach, A. C. J.

Becker, J.